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**BEFORE THE
SURFACE TRANSPORTATION BOARD
Washington, DC**

FINANCE DOCKET NO. 35304

**SAN FRANCISCO BAY RAILROAD – MARE ISLAND
NOTICE OF EXEMPTION – CALIFORNIA NORTHERN RAILROAD**

**REPLY OF CITY OF VALLEJO TO SAN FRANCISCO BAY RAILROAD –
MARE ISLAND’S REPLY TO PETITION TO REVOKE EXEMPTION**

Dated: June 4, 2010

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Communications with respect to this document should be addressed to:

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The City of Vallejo, (hereinafter “City”) hereby submits its Reply to the Reply of San Francisco Bay Railroad (“SFBR”) to the Petition to Revoke Exemption of Lennar Mare Island, LLC (“the SFBR Reply”) in this proceeding. The City submits this Reply for the specific purpose of correcting an inaccurate characterization contained in the SFBR Reply of the nature of the City’s status with respect to a portion of the rail segment that is the subject of this proceeding. Contrary to SFBR’s characterization, the City is not a residual common carrier because common carrier service has never operated over the portion of the line the City owns.

The City is the owner of certain real property and associated railroad trackage consisting of approximately 2.5 miles of right-of-way of varying width, beginning on or near "G" Street in Mare Island and continuing across the Wichels Causeway "Causeway" (contained within Parcel XXI-A as indicated in the U.S. Dept of Navy's Finding Of Suitability to Transfer (FOST)), turning northward, proceeding roughly parallel to Couch Street until it meets up with a second set of tracks (which it believes is currently leased or owned by California Northern Railroad (CNFR)) in the vicinity of the Flosden Yard near El Sendero Ct. in Vallejo. The City-owned portion of the rail line, which features no direct connections to rail shippers, connects Mare Island with the national rail system. The remainder of the line is located on the former naval base property, which is owned by Lennar Mare Island, LLC (LMI) pursuant to an existing Acquisition Agreement and Development Agreement whereby LMI has agreed to clean the land, develop it, installing infrastructure, and deeding back to the City appropriate rights of way and other property interests as the development process progresses.

SFBR asserts incorrectly that City is the residual common carrier over the line that is the subject of this proceeding. SFBR Reply at 2. However, there is no factual basis for SFBR's assertion because the subject track is an industrial spur and has not been used for common carrier rail service. For many years, the track was owned and operated by the federal government to serve the Mare Island Naval

Base. Except for the exemption San Francisco Bay Rail (SFBR) sought in this proceeding, City is not aware of any filing with the Board, or its predecessor, the Interstate Commerce Commission, that authorized common carrier service over this line. It appears that CNFR may have provided some service over the line for several years ending in early 2008 without benefit of a Certificate of Public Convenience and Necessity from this Board. While the City is supportive of the provision of rail service to Mare Island, the track segment owned by the City has historically been an industrial track serving the naval base, and service over it has not consisted of common carrier service. Accordingly, no factual basis exists for SFBR's allegation that the City is the residual common carrier.

Furthermore, as the draft Track Lease Agreement for Mare Island Track ("Track Lease Agreement") attached to the SFBR Reply as Exhibit J clearly reflects, the City "expressly disclaims any intent to become a rail carrier or to take on residual common carrier obligations". SFBR Reply, Exhibit J at p. 1. If SFBR seeks to rely on the draft Track Lease Agreement to support its claims in the SFBR Reply, SFBR cannot maintain that the City is a residual common carrier in the face of its own evidence that it intends to accept that the City is *not* a residual common carrier in its proposed agreement with the City. The City and SFBR's negotiations regarding a long term lease involving the City-owned track are currently suspended pending the outcome of these STB proceedings.

Finally, well-established case law at this Board confirms that the City has not exercised and will not exercise control over traffic movements on this Line. In ICC Finance Docket No. 32422, *Indiana Hi-Rail Corp., Central Illinois Shippers, Inc. and Cisco Cooperative Grain Co.—Show Cause, slip op.*, 1994 WL 716781 (I.C.C.) (Service Date December 29, 1994), the ICC identified circumstances in which an owner of property might assume some measure of common carrier duties:

(a) the owner controls the transportation by holding out service, filing tariffs, and receiving payment from shippers; (b) the owner controls the transportation but receives an exemption from regulatory requirements; or (c) the operator provides transportation under contract with shippers, but the owner in fact controls the transportation.

Id. at *7. The owner of the line in *Indiana Hi-Rail* did not assert "control" over the transportation and thus did not succeed to any common carrier obligation, residual or otherwise. In that case, the operator of the line was asserting that it had no common carrier obligation on the line. Here, where the line may become subject to this Board's jurisdiction once a third party (SFBR) secures authorization under 49 U.S.C. §10901 to operate there and that operator will assume the full common carrier obligation there is no reason to assert that the owner has any such obligation whatsoever. Any authorization SFBR may obtain from this Board should have no impact on the regulatory status of the City as owner of the line, since the City has


never had and will not have any part whatsoever in the control, marketing or operation of the service SFBR proposes to operate there.

WHEREFORE, in light of the foregoing, the City respectfully requests this Board to disregard any reference to the City as the residual common carrier in SFBR's pleadings in this proceeding, and to confirm in any decision it may issue in this proceeding that the City has no such status.

Respectfully submitted,

Dated: June 4, 2010,

FREDERICK G. SOLEY
City Attorney of the City of Vallejo



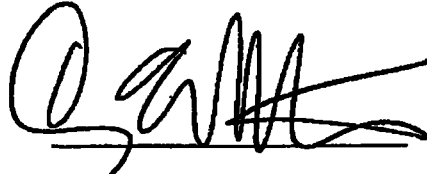
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VERIFICATION

I, Craig Whittom, Assistant City Manager / Community Development of the City of Vallejo, declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that I have reviewed the reply attached hereto and the factual statements are true based upon my personal knowledge, based upon documents I have seen, and where I do not have personal or direct knowledge, I believe the assertions to be correct.



Craig Whittom

Certificate of Service

I herby certify that on this 8th day of June, 2010, caused to be served a copy of the foregoing REPLY OF CITY OF VALLEJO TO SAN FRANCISCO BAY RAILROAD – MARE ISLAND’S REPLY TO PETITION TO REVOKE EXEMPTION, upon the following parties of record by first class mail with postage prepaid:

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